Supreme Court, U. S.
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NO. ~~79~~-1935

IN THE

Supreme Court of the United States

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

versus

PATRICIA ANN PHELPS BAILEY; CONNIE MAXINE ALLEN; JOY LYNN PHELPS; KIMBERLEY LEA TOURTELOTTE; ROBERT DERON PHELPS; a Minor; RONALD DEWAYNE PHELPS, a Minor; and ALICE ROWENA WATSON,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Supreme Court of the United States:

Southern Pacific Transportation Company respectfully presents this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Bailey v. Southern Pacific Transportation Company,* 613

F.2d 1385 (1980) (Per Curiam), and is reproduced at Appendix A. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is reported at __F.2d__ (1980), and is reproduced at Appendix B. The judgment of the Court of Appeals is reproduced at Appendix C.

JURISDICTION

The judgment sought to be reviewed was entered March 21, 1980. The petition for rehearing and suggestion for rehearing en banc were denied May 9, 1980. By order dated May 30, 1980, the Court of Appeals stayed issuance of the mandate until June 9, 1980 (See Appendix D).

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1). *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968). Subject matter jurisdiction results from complete diversity of citizenship between the parties. 28 U.S.C. § 1332.

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS IGNORED CONTROLLING TEXAS STATUTORY AND JUDICIAL AUTHORITY IN HOLDING THAT THE TRIAL COURT DID NOT ERR BY CHARGING THE JURY TO DISREGARD THE WIDOW'S REMARRIAGE AS AFFECTING HER DAMAGES IN THIS WRONGFUL DEATH ACTION?

APPLICABLE STATUTES

Article 4675a, Texas Revised Civil Statutes Annotated, Vol. 13A, page 297 (West Supp. 1980):

In an action under this title, evidence of the actual ceremonial remarriage of the surviving spouse is admissible, if such is true, but the defense is prohibited from directly or indirectly mentioning or alluding to any common-law marriage, extramarital relationship, or marital prospects of the surviving spouse. Added by Acts 1973, 63rd Leg., p. 43, ch. 29, § 1, eff. April 9, 1973.

STATEMENT OF THE CASE

This diversity suit was brought exclusively under the Texas Wrongful Death Act, Tex. Rev. Civ. Stat. Ann. art. 4671 *et seq.*, to recover damages for Petitioner's negligence in causing the death of R. E. Phelps in a car-train collision. The Respondents are the decedent's surviving kin who were authorized by the Texas Act to file the action. The jury found Petitioner 95% negligent and the decedent 5% negligent. The United States District Court for the Eastern District of Texas entered judgment on the jury verdict in the aggregate sum of $760,000.00.

The jury awarded Respondent Patricia Ann Phelps Bailey $300,000.00 as her share of the total. Reduced for her decedent former husband's contributory negligence, her portion of the judgment came to $285,000.00. Her attorneys had requested the jury to award her at least $250,000.00, representing one-half of the decedent's net worklife expectancy of $500,000.00. (Trial Transcript at 499-500).

More than a year prior to trial the widow had ceremonially remarried. Her new husband, Mr. Bailey, works at the same refinery near Port Arthur, Texas where the decedent had worked. It was undisputed that Mr. Bailey

has been a good husband, a good step-father to the two minor boys, a good economic provider, and generally a good influence for the family. (Trial Transcript at 78, 94, 359-60).

Respondents argued to the jury that Mrs. Bailey's remarriage could not be considered in deliberating her damages. (Trial Transcript at 497, 500). Petitioner was precluded from objecting to this argument in the jury's presence by the trial court's order in limine. (Clerk's Transcript at 80-81, 88).

Over Petitioner's objection the trial court charged the jury that according to Texas law the jury could not consider or deliberate the effects of Mrs. Bailey's remarriage in measuring her damages. (Trial Transcript at 581, 586-88). The judge stated:

> The Court will also instruct you that in assessing damages, you should not consider in any way the fact that Mrs. Bailey has remarried since the death of Robert Eugene Phelps. *Under the Laws of the State of Texas* the damages, if any, that these Plaintiffs are entitled to recover, were established at the time of death of the deceased, Robert Eugene Phelps, and *such remarriage does not operate to diminish the damages in any way, which are recoverable in this case.*
>
> In other words, *you will not consider or deliberate the question of remarriage in arriving at the damages* to be awarded to the widow and her children, or to reduce the damages that you would otherwise award the—to the Plaintiffs. (Trial Transcript at 581) (emphasis added).

This charge was assigned as error in the Court of Appeals. Without allowing oral argument, the Court of Ap-

peals, per curiam, affirmed the entire judgment. On petition for rehearing and suggestion for rehearing en banc, Petitioner urged the Court of Appeals to grant a new trial of Mrs. Bailey's damages, but the Court of Appeals denied the request.

REASONS FOR GRANTING THE WRIT

Diversity jurisdiction is still with us, and it is still the duty of federal courts in diversity cases to apply state statutes and state decional law as the state's highest court would apply those authorities. In this case the trial court and Court of Appeals have decided an important question of Texas law in a manner that conflicts with state legislation, clear legislative intent, and the Texas Supreme Court's firm pronouncements about the legislation's impact on the statutory wrongful death cause of action. Unless corrected by this Court, the Court of Appeals' error will severely frustrate the policy of the *Erie* doctrine in Texas Wrongful Death Act cases by encouraging the forum-shopping *Erie* was intended to prevent.

ARGUMENT

Before 1973, evidence of a surviving spouse's remarriage was not admissible in the Texas statutory wrongful death action for the purpose of mitigating damages. *J. A. Robinson Sons, Inc. v. Ellis,* 412 S.W.2d 728, 743 (Tex. Civ. App.—Amarillo 1967, writ refused n.r.e.); *Exxon Corp. v. Brecheen,* 519 S.W.2d 170, 185 (Tex. Civ. App. —Houston [lst Dist.] 1975, *reversed,* 526 S.W.2d 519 (Tex. 1975).

But in 1973 the Texas Legislature added article 4675a, *supra,* to the Wrongful Death Act. The bill was

part of a tort law and insurance reform package developed through the joint efforts of claim lawyers, defense lawyers, and the State Bar. No one seriously opposed the bill in the Texas House of Representatives or the Texas Senate. It passed the House by a vote of 147 to one and the Senate by 25 to five.

In recorded testimony before both houses of the Texas Legislature, persons directly responsible for the bill's passage announced very plainly, without any protest or question, that the bill was designed to reduce insurance premiums by reducing remarried widows' recoveries in Wrongful Death Act cases and to *permit* the defense to present ceremonial remarriage evidence *in mitigation of damages.* (See Appendix E, testimony of Mr. John Lawrence before the House Judiciary Committee March 6, 1973, and testimony of Senator Doc Blanchard before the Senate Jurisprudence Committee March 27, 1973).

Two years later article 4675a came before the Texas Supreme Court in *Exxon Corp. v. Brecheen, supra.* The trial court had refused to admit evidence of the surviving wife's ceremonial remarriage. The Court of Civil Appeals considered this error nonreversible because, even though the plaintiff had remarried and no longer needed the decedent's support, counsel, and services, the court was not convinced that the jury would have reduced her damages had the evidence been admitted. See 519 S.W.2d at 184-85.

The Texas Supreme Court flatly reversed the Court of Civil Appeals, explicitly condemning the premise that the error could be held harmless if the jury might have returned the same award anyway. 526 S.W.2d at 525. The Texas Supreme Court said in a unanimous opinion:

> The Legislature has decreed in clear and explicit terms that evidence of the actual ceremonial remarriage of a surviving spouse is admissible in the statutorily authorized wrongful death action. *The legislative determination forecloses judicial inquiry into the effect upon the fact finder of evidence that the surviving spouse has ceremonially remarried.* 526 S.W.2d at 525 (emphasis added).

This could not be so unless the Texas Supreme Court had recognized in *Brecheen* that the Legislature *intended* article 4675a to allow the jury, in its discretion, to reduce a surviving spouse's damages on account of his or her lesser need for the advice, support, counsel and services of the decedent following a ceremonial remarriage. When the Texas Supreme Court said that the "legislative determination [to admit remarriage evidence] *forecloses judicial inquiry into the effect upon the fact finder*", any doubt about the proper understanding of the Legislature's intent should have been put to rest. If article 4675a "forecloses judicial inquiry", then *a fortiori* it forecloses judicial edict as charged by the trial court in this case.

Incredibly, the per curiam decision of the Court of Appeals fails even to cite *Brecheen*. The Court of Appeals is guilty of reliance on the same quality of speculation and conjecture that led the Texas Supreme Court to reverse the Court of Civil Appeals in *Brecheen*. The Court of Appeals seriously erred in its failure to give due regard to the reasoning of the Texas Supreme Court and the direcly-pertinent Texas legislative history that Petitioner brought to its attention. The Court of Appeals violated the fundamental precepts of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the Rules of Decision Act, 28 U.S.C. § 1652.

Erie requires that federal courts in diversity cases follow the law as declared by the state legislature or the state's highest court. The Court of Appeals easily could have followed both requirements in this case but followed neither, relying instead on an erroneous intermediate appellate court opinion, *Richardson v. Holmes,* 525 S.W.2d 293 (Tex. Civ. App.—Beaumont 1975, writ refused n.r.e.), which does not even speak to whether or how a jury should be instructed with respect to the applicability of a surviving spouse's remarriage to his or her damages. The Court of Appeals also cited dicta from its own opinion in *Conway v. Chemical Leaman Tank Lines, Inc.,* 525 F.2d 927, 930 (Panel), 540 F.2d 837 (5th Cir. 1976) (Panel Rehearing), but the only authority cited in *Conway* for the proposition that the jury should be instructed not to consider remarriage in mitigation of damages was *Richardson v. Holmes, supra.*

Under the *Erie* doctrine federal courts have a responsibility to recognize a change in state law. That is the thrust of the development of this Court's decisions from the "ventriloquist's dummy" days of *Fidelity Union Trust Co. v. Field,* 311 U.S. 169 (1940), through *Commissioner v. Estate of Bosch,* 387 U.S. 456 (1967). See generally C. Wright, Federal Courts § 58 at 236-39 (2d ed. 1970); Friendly, *In Praise of Erie—And of the New Federal Common Law,* 39 N.Y.U.L. Rev. 383 (1964).

Here we surely have a case, in light of the Texas Legislature's enactment of article 4675a, its legislative history, and the Texas Supreme Court's rationale in *Brecheen,* involving "developing . . . authorities that cast[ ] a shadow over the established ones" and a "legislative development that promises to undermine the

[former] judicial rule". *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198, 205 (1956). The Court of Appeals erroneously overlooked that "under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling". *Commissioner v. Estate of Bosch, supra,* 387 U.S. at 465.

Richardson v. Holmes, supra, by the intermediate Texas appellate court is not a persuasive authority for the proposition that juries may not consider ceremonial remarriage evidence in mitigation of a surviving spouse's damages under today's Texas Wrongful Death Act. *Richardson* has been sharply criticized. Note, 55 Tex. L. Rev. 557 (1977). The Texas Supreme Court's refusal to hear *Richardson* as a "no reversible error" case also meant that the court was "not satisfied that the opinion of the Court of Civil Appeals in all respects . . . correctly declared the law". Rule 483, Texas Rules of Civil Procedure. The Texas Supreme Court applies the notation "no reversible error" or "n.r.e." when as many as four of its nine justices do not agree that the Court of Civil Appeals has correctly declared the law. Calvert, *The Application for Writ or Error,* 5 Texas Rules Annotated 473, 480 (Vernon 1967).

Article 4675a is an integral part of the Texas Wrongful Death Act, equal in dignity to every other part. Petitioner is entitled, as are Respondents, to enforcement of the full plan and purpose of the legislative scheme, without which this action could not have been brought at all. Petitioner does not seek any privilege beyond the plain import of the legislation that now governs the wrongful death cause of action. Specifically, the law today must be that the jury is not to be charged *one way or the other* on whether account may be taken of a sur-

viving spouse's remarriage in awarding damages under the Texas Act. The Texas Supreme Court in *Brecheen* did not declare that article 4675a "forecloses judicial inquiry into the effect [of ceremonial remarriage] upon the fact finder" in the expectation that juries would be denied the Legislature's intended use of the evidence by instructions from the bench.

CONCLUSION

Petitioner, Southern Pacific Transportation Company, respectfully petitions this Court to grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the portion of the judgment in favor of Respondent Mrs. Patricia Ann Phelps Bailey.

Respectfully submitted,

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By: _____
ROBERT Q. KEITH

Attorneys of Record for Petitioner, Southern Pacific Transportation Company

Of Counsel:

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June 9, 1980

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing instrument were duly served in the number and in a manner prescribed by the Rules of this Court upon all other counsel of record this _____ day of June, 1980.

ROBERT Q. KEITH

APPENDIX A

Patricia Ann Phelps BAILEY et al.,
Plaintiffs-Appellees,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant-Appellant.

No. 79-2637

Summary Calendar.*

UNITED STATES COURT OF APPEALS,

Fifth Circuit.

March 21, 1980.

Diversity suit was filed to recover for the wrongful death of a 41-year-old man who was killed when his car collided with a locomotive at a highway grade crossing. The United States District Court for the Eastern District of Texas, Joe J. Fisher, Chief Judge, entered final judgment in the aggregate sum of $760,000, and denied the railroad's motion for a new trial. The railroad appealed, and the Court of Appeals held that: (1) under Texas law, evidence that decedent's widow had remarried could not be considered in mitigation of damages; (2) evidence concerning other accidents and signal malfunctions at the crossing was relevant to establish that the crossing was extrahazardous and that the railroad had notice that the warning signal had failed on prior occasions; (3) the

* Fed. R. App. P. 34(a); 5th Cir. R. 18.

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railroad's failure to object on four of the five occasions when the trial court admitted testimony about decedent's character for care in driving a car made it unnecessary for the court to determine whether the trial court committed error on the one occasion when character testimony was admitted over objection; (4) even if the district court committed error in admitting the testimony as to decedent's careful driving, the error was harmless; (5) certain testimony given at the trial of a prior suit arising out of a collision at the same crossing was admissible under the former testimony exception to the hearsay rule; and (6) under the circumstances, the verdict was not an abuse of discretion.

Affirmed.

Robert Q. Keith, Beaumont, Tex., for defendant-appellant.

Strong, Pipkin, Nelson, Parker & Powers, Kenneth L. Parker, Beaumont, Tex., for Bailey, et al.

Michael L. Baker, Beaumont, Tex., for Alice Rowena Watson.

Appeal from the United States District Court
for the Eastern District of Texas

Before CHARLES CLARK, VANCE, and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

On November 30, 1976, R. E. Phelps, a 41 year old welder, left home for work at the American Petrofina plant in Groves, Texas. His daily route took him over a

grade crossing in Orange County where State Highway 62 intersects the Southern Pacific's tracks. He had traveled this route for many years without incident. On this particular day, however, at approximately 7:00 a. m., a Southern Pacific locomotive sliced his car in two. This tragic accident took Phelp's life, and left behind a widow, five children, and a mother who was partially dependent upon her son for support.

A diversity suit was subsequently filed in the Eastern District of Texas, pursuant to the Texas Wrongful Death Act, Tex. Rev. Civ. Stat. Ann. art. 4671, *et seq.* (Vernon Supp. 1980). The plaintiffs were the deceased's wife, children and mother. They alleged that the warning signal at the crossing failed to function on the morning of November 30th, and that Southern Pacific's negligence caused this failure. Plaintiffs also claimed that the crossing was extrahazardous and that the crew had operated the train at an excessive speed, without proper lookout, and without appropriate sound warnings during its approach.

The case was tried on May 1st and 2nd, 1979. Plaintiffs introduced evidence to substantiate their claim that the railroad was negligent. The defendant put an eyewitness and expert testimony that contradicted plaintiffs' evidence, and which tended to show that the deceased's contributory negligence (excessive speed and failure to keep a proper lookout) caused the accident. The jury retired with general interrogatories and on May 3rd returned with a verdict for the plaintiffs.

The jury verdict found defendant 95% negligent and the deceased 5% negligent. The panel then assessed damages at $300,000 for the wife, $92,000 for each of the

five children, and $40,000 for the deceased's mother. The trial judge reduced the awards based upon the decedent's contributory negligence and entered final judgment in the aggregate sum of $760,000. The defendant filed a timely motion for new trial, and the district court promptly denied the motion. Defendant then instituted this appeal.

The defendant raises six points of error on appeal. The first is leveled at the district court's jury charge. The deceased's wife remarried prior to the trial of the lawsuit. While the trial judge allowed the remarriage to come into evidence, he instructed the jury that they were not to consider the remarriage in assessing damages. The defendant contends this instruction is contrary to Texas law.

The crux of defendant's position is that the Texas Legislature, when it enacted Article 4675a[1] (making evidence of remarriage admissible), intended to allow juries to consider the effect of remarriage on the surviving spouse's damages. To support this assertion defendant refers us to the testimony of State Senator Blanchard before the Texas Senate Jurisprudence Committee on March 27, 1973. During the course of his testimony concerning then proposed Article 4675a he said, "It just provides that if there is a ceremonial marriage you may present this in evidence in mitigation of damages, nothing more or nothing less." There is no other reference to this

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1. Tex. Rev. Civ. Stats. Ann. art. 4675a (Vernon Supp. 1980) provides:

> In an action under this title, evidence of the actual ceremonial remarriage of the surviving spouse is admissible, if such is true, but the defense is prohibited from directly or indirectly mentioning or alluding to any common-law marriage, extramarital relationship, or marital prospects of the surviving spouse.

aspect of Article 4675a in the Senate hearings, the House hearings, or in the debates on the floor of the Legislature.

Plaintiffs argue that the district judge's instruction tracks Texas law. They rely on two cases to buttress their position: *Richardson v. Holmes,* 525 S.W.2d 293 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) and *Conway v. Chemical Leaman Tank Lines, Inc.,* 525 F.2d 927, *on rehearing,* 540 F.2d 837 (5th Cir. 1976). In both cases the courts held that evidence of remarriage was not admissible for the purpose of mitigation of damages.

[1-4] In diversity cases *Erie* teaches us that where state law has been announced by the state's highest court —it is to be followed. Intermediate state court decisions are also to be followed in the absence of a decision from the highest court, unless this Court is convinced that the highest could would decide otherwise. *Commissioner v. Bosch,* 387 U.S. 456, 465, 87 S.Ct. 1776, 1782, 18 L.Ed.2d 886 (1967). The scanty support that the defendant supplies for its contention that evidence of remarriage is admissible for the purpose of mitigation of damages is not the persuasive data that a federal court requires before it will depart from the law as set forth by an intermediate state court. We find no error in the trial court's jury charge.

[5] Defendant's next three points of error focus on evidentiary rulings made by the district judge. Its first quarrel is with the rulings that allowed the plaintiffs to present testimony about other accidents and signal malfunctions at this particular crossing. The railroad contends that this evidence was irrelevant.

[6] The plaintiffs introduced evidence of "other happenings" to establish that: (1) the crossing was extrahazardous and (2) the railroad had notice that the warning signal had failed on other occasions. Given these two legal theories of liability, the testimony about other signal malfunctions was clearly relevant. Such evidence permitted the jury to draw a reasonable inference that the crossing was dangerous and that the railroad had notice of mechanical difficulties with the signal. The fact that the malfunctions occurred at a different time of the day or that the witness to the light failures was traveling in a different direction goes strictly to the weight to be given the evidence. *Jones & Laughlin Steel Corp. v. Matherne,* 348 F.2d 394 (5th Cir. 1965).

[7] The testimony about prior car-train collisions at the crossing was also relevant. Both witnesses who testified about prior accidents stated that the signal lights did not flash and the warning bells did not ring before their collision. That is exactly what plaintiffs allege happened on the day in question. Once again, such evidence permitted the jury to draw a reasonable inference that the crossing was extrahazardous and that the railroad had notice. The fact that the accidents occurred at different times in the day and involved cars traveling in the opposite direction goes to the weight to be given the evidence. *Id., Stoler v. Penn Central Transportation Co.,* 583 F.2d 896 (6th Cir. 1978).[2]

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2. Appellant relies heavily on *Roundtree v. Seabound Coast Line R. R. Co.,* 418 F.Supp. 220 (M.D. Fla. 1976). In *Roundtree* the trial court refused to allow plaintiff to read certain interrogatories into evidence. The interrogatories asked: (1) whether there had been other car-train collisions at the crossing (to which the rairoad answered yes) and, if so, (2) the names and addresses of the drivers, along with the time and date of the accident, and the weather conditions.

Defendant contends the trial judge erred when he admitted testimony about the deceased's character for care in driving a car. The railroad cites five instances in the trial when such testimony came into evidence. We find this point to be devoid of merit.

[8, 9] First, the railroad did not object on four of the five occasions when character testimony was raised by a witness. Federal Rule of Evidence 103(a)(1) bars the defendant from assigning error to the admission of character testimony in those instances. This failure to object relieves this Court from having to determine whether the trial court erred the one time character testimony was admitted over an objection. Even assuming the trial court erred in not sustaining defendant's objection, the doctrine of harmless error surely encompasses one statement during the course of a two day trial that the decedent was a careful driver. Fed. R. Civ. Proc. 61.

Defendant's final evidentiary contention is that the district judge erred when he allowed plaintiffs to read into evidence the testimony given at a previous trial by Mr. John Dixon. The previous trial involved a collision at this same crossing between a truck Dixon was driving and a Southern Pacific train. Dixon testified at the prior trial that no bells or flashing lights came on to warn

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Roundtree is distinguishable. Plaintiff's theory of liability in *Roundtree* was that a clump of trees and the bright rays of the rising sun made the crossing extra-hazardous. In order for the jury to be able to draw an inference from testimony about prior accidents that the crossing was extra-hazardous, the plaintiff had to establish a similarity between the prior accidents and his car-train collision. Given his legal theory of liability, that meant showing that the time of day, type of day and traveling direction of the vehicles were similar. Plaintiffs simply did not make such a showing. In our case, the plaintiffs did establish a substantial similarity between prior accidents and the accident that took R. E. Phelp's life.

of the train's approach. The railroad contends that this prior testimony was hearsay.

The trial judge correctly concluded that the testimony fell within the hearsay exception contained in Federal Rule of Evidence 804(b)(1).[3] Rule 804(b)(1) requires first that the declarant be unavailable.

[10, 11] Rule 804(a)(5) defines unavailability as:

> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—
>
> (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

Plaintiff's counsel stated at trial that Dixon resided in Arizona, was beyond the court's process, and could not be brought to Beaumont to testify. "It was within the discretion of the trial court to accept or reject counsel's representations [about unavailability]." *Castilleja v. Southern Pacific Co.*, 445 F.2d 183, 186 (5th Cir. 1971). The defendant must demonstrate that the trial court erred in accepting plaintiffs' explanation. *Id.* The defendant has

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3. Federal Rule of Evidence 804(b)(1) provides:
(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

not met its burden, and no reason is made apparent to find that the trial court erred in holding Dixon to be unavailable.

[12] The other Rule 804(b)(1) requirement in dispute in the case at bar is the provision stating that the party against whom the testimony is being offered must have had a similar motive to examine the witness in the prior proceeding. Contrary to the defendant's assertion, its motive to examine in the prior case did not differ from that in the case at bar. Dixon testified at the previous hearing that the signal lights did not function properly and this failure caused the collision between his truck and the engine. Surely the railroad would have as one of its motives the desire to show that Dixon was mistaken in his observation. Since the factual dispute in this case is whether the signal lights worked properly, the defendant's motive to cross-examine would be virtually the same. Dixon's testimony fits neatly within the requirements of Rule 804(b)(1). This Court must reject Southern Pacific's attempt to assign error to this evidentiary ruling.[4]

Defendant's final two points challenge the jury's assessment of damages and division of negligence. We are not convinced by either of the defendant's arguments.

[13, 14] The railroad argues that the amount awarded to each of the plaintiffs is excessive. However, it was the jury and the trial judge which had the opportunity to hear all the testimony and observe all the witnesses.

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4. The railroad also argues that if Dixon's testimony was admissible, it should have been allowed to introduce into evidence the fact that the jury held Dixon to be 75% contributorily negligent. This point has no merit. The jury finding on contributory negligence is irrelevant to any issue in the case.

Where the jury has returned an award and the trial judge has denied defendant's motion for a new trial, this Court is "exceedingly hesitant" to alter the verdict. *Bridges v. Groendyke Transport, Inc.*, 553 F.2d 877, 880 (5th Cir. 1977). Only where the verdict is "so gross . . . as to be contrary to right reason" or a "clear abuse of discretion with respect to assessment of damages" will this Court overturn a jury's decision that has been approved by the trial judge. *Id.* It cannot be asserted that the award is "contrary to right reason." The decedent was a 41 year old welder who, at the time of his death, was earning over $20,000 per year. The evidence showed he was terribly close to his family and continued to lend support (physical, financial and moral) to his mother. The jury award of $760,000 under the circumstances presented in this record can hardly be termed a clear abuse of discretion.

The defendant's final point is that the jury erred in finding the decedent to have been only 5% contributorily negligent. The railroad contends that, in light of this finding, the district court should have granted its motion for a new trial.

[15, 16] A trial judge's denial of a motion for a new trial will be reversed only where it is shown that the court abused its discretion. In order to establish an abuse of discretion the defendant must show an "absolute absence of evidence to support the jury's verdict." *Urti v. Transport Commercial Corporation,* 479 F.2d 766, 769 (5th Cir. 1973). The record clearly contains evidence to support the jury verdict. This point is overruled.

The judgment entered by the district court is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

May 9, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-2637—PATRICIA ANN PHELPS BAILEY, ET AL. vs. SOUTHERN PACIFIC TRANSPORTATION CO.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Gilbert F. Ganucheau, Clerk

By /s/ SALLY HAYWARD
Deputy Clerk

cc: Mr. Robert Q. Keith
Mr. Kenneth L. Parker
Mr. Michael L. Baker

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 79-2637
Summary Calendar

D. C. Docket No. B-77-0629-CA

PATRICIA ANN PHELPS BAILEY, ET AL.,
Plaintiffs-Appellees,

versus

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

Before CHARLES CLARK, VANCE and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that the defendant-appellant pay to the plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

March 21, 1980

ISSUED AS MANDATE:

APPENDIX D

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

June 2, 1980

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

Mr. Robert Q. Keith
Attorney at Law
1400 San Jacinto Bldg.
Beaumont, TX 77701

No. 79-2637—PATRICIA ANN PHELPS BAILEY, ET AL. vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY

MANDATE STAYED TO AND INCLUDING JUNE 9, 1980.

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court, effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore, will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

Gilbert F. Ganucheau, Clerk

By /s/ Brenda Hauck
Deputy Clerk

/bh

enc.
cc: Mr. Kenneth L. Parker
Mr. Michael L. Baker

APPENDIX E

SENATE JURISPRUDENCE COMMITTEE
March 27, 1973
HB 236

Transcribed by
Senate Staff Services

I, Betty King, Secretary of the Texas Senate and Custodian of the Senate Records, certify that this transcript is a true copy of the transcript of action on HB 236 in the Senate Jurisprudence Committee on March 27, 1973, on file in the Texas Legislative Reference Library.

/s/ BETTY KING

SUBSCRIBED AND SWORN to by the said Betty King, this the 11th day of October, 1979, to certify which witness my hand and seal of office.

/s/ PEGGY B. BRINKMAN
Notary Public in and for
Travis County, Texas

SENATE JURISPRUDENCE COMMITTEE
March 27, 1973
HB 236

CHAIRMAN: We will vary the docket just a bit as an accommodation to the distinguished Senator from Lubbock.

BLANCHARD: If I could, Mr. Chairman, I would like to ask—SB 125 was set. It is a companion bill and identical to HB 236 and I would like to ask that you lay out at this time HB 236.

CHAIRMAN: The chair will lay out HB 236 and recognize Senator from Lubbock.

BLANCHARD: Mr. Chairman and members of the committee, this is a new section to the Wrongful Death statute of Texas. It merely adds one section to be known as Article 4675 a, dealing with the proof of remarriage, and it provides: (it will be very quick to read it to you) . . . in an accident under wrongful death section, evidence of the actual ceremonial remarriage of the surviving spouse is admissible if such is true, but the defense is prohibited from directly or indirectly mentioning or alluding to any common law marriage, extra-marital relationship, or marital prospects of the surviving spouse.

At the present time you may not—the fact that the widow, in a wrongful death action, or the husband in a wrongful death action, has remarried and perhaps is in better shape as far as financial shape is concerned after the marriage than she was prior to that; heretofore that was inadmissible and could not be alluded to. This is one of the package of ten bills which was offered as an

agreed group along with—by the plaintiff lawyers, the defense lawyers, and the State Bar of Texas.

That is all that the bill does. It just provides that if there is a ceremonial marriage you may present this in evidence in mitigation of damages, nothing more or nothing less. Therefore—if there are any questions—there are various members of the Texas Trial Lawyers here, and members of the State Bar. Senator Word is here who has pretty well shepherded this group of legislation. I'll be glad to yield to any members of the committee for questions, or I'm sure that any of those present would answer any questions that might be.

CHAIRMAN: All right, Senator. Are there questions you want to ask? Senator Harris of Dallas.

HARRIS: I particularly like the last phrase and change—proof of remarriage, or marital prospects of the surviving spouse. Do you have to show that in evidence too?

BLANCHARD: You may not. But the defense is prohibited from directly or indirectly mentioning or alluding to any common law marriage, any extra-marital relationship or marital prospects.

HARRIS: "Marital prospects" would be awful shakey evidence.

BLANCHARD: It would be, and therefore the fact that she is engaged, or he is engaged or they are planning a marriage, you may not do it, but if there is a ceremonial marriage as such and it is true, then you may show that in evidence—the defense may show it in evidence in the defense of wrongful death act.

: Would it have to be a legal ceremonial marriage, or do you know?

BLANCHARD: "Ceremonial"—I take to be—it's defined what a ceremonial marriage is, Senator in the statute, and it would have to be one performed by a clergy, or by (that?), otherwise by definition of ceremonial marriage as contrasted with common law as defined in the statutes.

CHAIRMAN: Any other questions? Does the committee care to hear any witnesses?

BLANCHARD: Witnesses are here if anybody would like to hear from them.

CHAIRMAN: We have a number of witnesses here. I believe that I am correct in that none have registered against the bill. Is there anyone here in opposition to the bill? Are there any questions? There is no one here to appear against the bill. Then Senator from Potter moves that HB 236 be reported back to the Senate with the recommendation that it do pass and be printed. Secretary call the roll. (Roll call) There being a majority of the committee in favor of reporting the bill, it is so ordered.

JUDICIARY COMMITTEE

March 6, 1973

H.B. 236

THE STATE OF TEXAS §
COUNTY OF TRAVIS §

I, Julia A. Reaves, a Notary Public in and for Travis County, Texas, do certify that the attached is a true, complete and accurate transcript of the testimony heard before the House Committee on Judiciary on March 6, 1973.

GIVEN under my hand and seal of office at Austin, Texas, this the 11th day of October, 1979.

/s/ JULIA A. REEVES
Julia A. Reaves, Notary Public
in and for Travis County, Texas

TEXAS HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

March 6, 1973

H.B. 236

CHAIRMAN DeWITT HALE: The Chair lays out at this time H.B. 236, and recognizes Mr. Williamson.

REP. BILLY WILLIAMSON: Mr. Chairman and Members. For the benefit of the new members, my name is Billy Williamson, and I represent, or keep somebody from representing District 12 in the legislature.

I am the author of H.B. 236. H.B. 236 is one of the ten bills, a series of which this committee has heard or is hearing that has been sponsored by the State Bar. This bill is one that permits the introduction of evidence to show the remarriage of a surviving spouse in a wrongful death action, but it prohibits the introduction of evidence of any common-law marriage, extramarital relationship, or marital prospects of the surviving spouse, even a meaningful relationship.

Tonight, I have as a witness—in fact, there are several who would, if the committee so desires, to testify in behalf of this bill, but I do have the president of the Texas Association of Defense Counsels, Mr. John M. Lawrence, III of Bryan, Texas. He has practiced law in Bryan since he graduated from The University of Texas in 1949. He is a past president of the Brazos County Bar Association, a charter member of the Texas Bar Foundation, has served on several State Bar committees, including the Administration of Justice Committee, Professional Efficiency and Economics Research Committee, Grievance

and Grievance Prosecutions Committee. I would like to call him at this time in the event that for a statement, and if you have any questions—incidentally, he, Mr. Lawrence will not be curt with you, but as any good lawyer, I have instructed my witness to be responsive, but not to elaborate in the interest of time.

CHAIRMAN HALE: First, let me say that we are delighted to have you here; all of you gentlemen from the State Bar. We like to think that this committee is the Bar's committee, and unfortunately, we don't see enough of the Bar. I am delighted to see the president of the State Bar here with you. Mr. Bowmer, would you stand up and be recognized? Any of you who are not familiar with the president of your State Bar, Mr. Jim Bowmer, here in the back. We hope you will honor us with your testimony, Jim.

Would you raise your hand, please. Do you solemnly swear that the testimony you will give on matters pending before the committee will be the truth, the whole truth, and nothing but the truth, so help you God?

MR. LAWRENCE: I do.

CHAIRMAN HALE: Please state you name and the capacity in which you appear before the committee, and then you may proceed.

JOHN LAWRENCE

John Lawrence. I am a lawyer from Bryan. I am here on behalf of the State Bar. I am a director of the State Bar. I don't have any idea where Mr. Williamson got hold of all that material that he just read then. But I am here to discuss with you and to testify in favor of

this H.B. 236, and to say to you that I happily believe that it is one of the items within the State Bar packet that is one simple enough for me to understand, and that's the reason they let me discuss this with you.

And second, I think it is completely unopposed, which is most unusual, particularly anything dealing, as you know, with lawyers for them to get in harmony on everything and then, as far as I know, I will be very surprised if you have any testimony in opposition to this.

Mr. Chairman, I was going to introduce President Bowmer and say to you that under his leadership, all phases of the trial bar have come together and have put together what we feel is a very important ten-bill package that would be a responsible reform for the automobile insurance reform. We feel that it is a very responsible attempt to reform an area where we have had violent conflicts in the past. In addition, we have with us also the immediate past president of the Texas Trial Lawyers Association, Mr. Frank Abraham, from Houston, and he will say something. In addition to that, Senator J. P. Word and Mr. Neeley Lewis, also a lawyer from Bryan, in the Insurance Committee, and hopefully they will be up here prior to the time that we finish this, or I give you fair warning that they may be here, so you may want to take speedy action on this.

We have the vice president of the State Bar, Jack Hebdon; the president of the Texas Trial Lawyers Association, Mr. Woody Dryden from Beaumont; H. C. Pittman, the Executive Director of the State Bar; Davis Grant, the General Counsel of the State Bar.

As I said, this is a simple bill and I have sat in your gallery many times and heard bills described as that,

that I don't think a Philadelphia lawyer could have understood in a long time, but at any rate, this is a one-page bill. The only thing in the world that it does, it changes and does away with lots of the conflict that we always have in a death action by a widow where there has been sufficient delay for her to either become enamored with another gentleman or to have committed marriage. And, of course, all types of motions in limine are filed on both sides; one to the effect that the defense lawyer is not able to show that the widow Jones is now the happily newlywed Smith, and on the plaintiff side that to keep the defendant's attorney from referring to extramarital relations that she had, common-law marriage, or even the prospects that she has of a marriage. We feel that fair play would result by the adoption of this bill. It is a balance along with the other nine bills in the State Bar package, and I call your attention particularly to the fact that this is one of the bills that undoubtedly will reduce rates. I say again this is one of the bills that undoubtedly will reduce insurance premiums because it tends from a psychological standpoint to decrease the amount of recovery, or the amount of an award that would be given to a woman once she had remarried, and in that way, while we have no figures to tell you exactly what it is, common sense and logic would certainly show that with a reduction of an award that you would have a tendency to hold the rates down, either visibly decrease them or keep them from going up in response to other parts.

That's all I have, Mr. Chairman, unless there would be some questions. Hopefully, we would ask for a favorable vote on this on out to the floor of the House.

CHAIRMAN HALE: Are there any questions?

Thank you very much.

MR. LAWRENCE: I would like to call Mr. Abraham, if I may, please, sir.

CHAIRMAN HALE: Fine. Mr. Abraham. We are delighted to have you here again.

MR. ABRAHAM: Thank you, sir.

CHAIRMAN HALE: It's like old homecoming, isn't it.

MR. ABRAHAM: Yes, sir.

CHAIRMAN HALE: Do you solemnly swear that the evidence you will give on matters pending before the committee will be the truth, the whole truth, and nothing but the truth, so help you God?

MR. ABRAHAM: I do.

CHAIRMAN HALE: Please state your name and the capacity in which you appear before the committee.

FRANK ABRAHAM

Frank Abraham, lawyer in behalf of the State Bar of Texas.

John and I and Jim Bowmer were just down with Renal and some of the others on your committee before the Insurance Committee, and it sure is refreshing for the lawyers to come up before this committee and leave the steely eyes of some of the members on the Insurance Commission that don't look too highly toward our package reform bill and automobile reparations.

I have before me a article by the American Bar that tells about what happened in the fiasco in Massachusetts

when they were led down the primrose path to adopting a no-fault insurance bill. They point out that the Bar of the Massachusetts Commonwealth was not without its share of the blame. With few exceptions, the Bar sat back and allowed the public to be pushed hither and yon without taking any effective stand on behalf of the consumer. The Bar should have been more forceful in critical years in both the legislative field and in the protective consumer interest at administrative rate hearings. Instead, the Bar took no real active part in improving the judicial system of part reparations. Of course, the Bar's inattention was due in part to the division between plaintiff and defendant's bars. The attorneys habitually representing the insurance companies were rather reluctant to appear at rate hearings and urge lower rates or to appear before the legislature urging more liberal laws for the injured.

The insurance industry took its share of the blame. The insurance industry in Massachusetts treated the victims of accidents as their great adversaries and spent much of their time and effort at the legislative session attempting to retain old rules and outmoded rules governing liability. In general, the insurance industry spent its time and energy trying to defeat more liberal rules of recovery. The insurance companies also had an insatiable appetite for the premium dollar, and the state regulatory agencies were not equal to the task. The legislature did not respond adequately to the problem. It permitted antiquated common law rules to bar victims who should otherwise be permitted to recover. Massachusetts retained until 1971 the antiquated doctrine of contributory negligence as a complete bar to the action for personal injuries and required until 1972 proof of gross negligence for

passengers to recover against hoax drivers and retained charitable and governmental immunities.

Gentlemen, in Texas, the State Bar and all of the lawyers are determined not to lt happen to our state what happened to Massachusetts. We come to you united in trying to preserve our judicial system in the field of automobile reparations.

Groucho has just given me a note to cut it off, and I did want to tell you. . . .

CHAIRMAN HALE: Did you mean Mr. Williamson? Would that he follow his own admonition.

MR. ABRAHAM: The only thing I wanted to say was that this bill is an effort, a part of the joint package of the State Bar to present a reform measure within the automobile reparation system of Texas, and is supported by all the lawyers on both sides of the docket.

Thank you.

CHAIRMAN HALE: Are there any questions? Fine. Mr. Jones.

REP. JONES: Will the Chair entertain a motion at this time?

CHAIRMAN HALE: Let's see. Do you have other witnesses? The Chair has some other affidavits here.

MEMBER: We don't need anymore witnesses here.

CHAIRMAN HALE: Mr. Dryden. Is Mr. Dryden here?

MEMBER: He is still downstairs.

CHAIRMAN HALE: It doesn't matter. The Chair doesn't want to cut anybody off if they are here and they have filed—even Mr. Williamson. Mr. Bowmer, do you care to say anything? Were you here particularly on this bill or just paying us a friendly visit out of long affection for this committee?

MR. BOWMER: Mr. Chairman, I am here on this bill, and I support what's been said and I also have tremendous affection for this committee?

CHAIRMAN HALE: Well put. You can see why he is president of the State Bar. Mr. Jones.

REP. JONES: Mr. Chairman, I move that we refer House Bill 236 back to the floor with the recommendation that it do pass.

CHAIRMAN HALE: All right. Mr. Jones, I don't know if you were here before. Before the Chair will accept that motion in accordance with sort of a unanimous agreement of the committee—were you here when we adopted a rule of procedures sort of by unanimous consent that we . . .

REP. JONES: I was here, Mr. Chairman, but I don't know that I agree.

CHAIRMAN HALE: Let the Chair see. Does anyone care to make a motion to send this bill to subcommittee? Apparently no motion on it. Are there any amendments? Does anyone have any amendments they want to offer to this bill before the Chair takes a motion on it? No amendments.

Mr. Jones moves that H.B. 236 be reported to the House with the recommendation that it do pass. Is there any discussion or any further motion? All of those in favor of the motion will vote aye; those opposed will vote no as your names are called. The Clerk will call the roll. (Clerk called the roll).

There being 14 ayes and no nays, the motion prevails and H.B. 236 is reported favorably.

REP. WILLIAMSON: Thank you, Mr. Chairman and members of the committee.

CHAIRMAN HALE: Thank you, gentlemen. We are delighted to have all of you here. Appreciate your time.

END OF TESTIMONY